



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

August 13, 2007

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2007-09

Marc E. Elias, Esq.
Caroline P. Goodson, Esq.
Perkins Coie
607 Fourteenth Street, N.W.
Washington, D.C. 20005-2011

Dear Mr. Elias and Ms. Goodson:

We are responding to your advisory opinion request on behalf of Kerry-Edwards 2004, Inc. ("KE04"), and Kerry-Edwards 2004 General Election Legal and Accounting Compliance Fund ("KE-GELAC") (collectively the "Kerry-Edwards Campaign") regarding whether, under the Federal Election Campaign Act of 1971, as amended ("FECA"), the Presidential Election Campaign Fund Act, as amended (the "Fund Act"), and Commission regulations, KE-GELAC may reimburse KE04 for a portion of broadcast time purchased during the 2004 general election.

The Commission concludes that KE-GELAC may reimburse KE04 up to 5% of the cost of broadcast time purchased during the 2004 general election.

Background

The facts presented in this advisory opinion are based on your letter received on June 13, 2007, as supplemented by an email received on June 21, 2007, and as revised on July 26, 2007, and August 3, 2007.¹

¹ On July 26, 2007, you withdrew two questions presented in the advisory opinion request and modified a third question.

KE04 is the authorized committee of 2004 presidential and vice presidential candidates Senators John F. Kerry and John R. Edwards. KE04 received public funds under the Fund Act, and it established the KE-GELAC pursuant to 11 CFR 9003.3.

During the 2004 general election campaign, KE04 purchased \$43,794,095 of broadcast time for its political advertisements.² Each of these advertisements included a minimum of four seconds devoted to compliance with the disclaimer requirements set forth in 2 U.S.C. 441d and 11 CFR 110.11.

Questions Presented

- 1. May the Kerry-Edwards Campaign treat some portion of the costs of broadcasting the advertisements described above as a compliance expense reimbursable by KE-GELAC pursuant to 11 CFR 9003.3(a)(2)?*
- 2. If the answer to question 1 is yes, what percentage of the costs of airing the advertisements (\$43,794,095) may be treated as a compliance expense? Would 5% be appropriate, based on the reasoning behind the 5% "default" percentage in the Compliance Manual?*

Legal Analysis and Conclusions

- 1. May the Kerry-Edwards Campaign treat some portion of the costs of broadcasting the advertisements described above as a compliance expense reimbursable by KE-GELAC pursuant to 11 CFR 9003.3(a)(2)?*

Yes, the portion of the broadcasting costs incurred by the Kerry-Edwards Campaign in complying with the disclaimer requirements of 2 U.S.C. 441d and 11 CFR 110.11 are compliance expenses that may be paid (and in this case, reimbursed) by KE-GELAC pursuant to 11 CFR 9003.3(a)(2).

Presidential candidates in general elections may receive public funds from the Presidential Election Campaign Fund established by the Fund Act. In exchange for receiving public funds, candidates must agree to a spending limit on their "qualified campaign expenses," which the Fund Act defines to include expenses incurred by a candidate to further the candidate's presidential election campaign. See 26 U.S.C. 9002(11)(A); 9003(b)(2); 11 CFR 9002.11; and 9003.2(a)(1). In most circumstances, publicly funded presidential general election candidates may not raise private contributions to pay for qualified campaign expenses. See 26 U.S.C. 9002(11)(A) and 9003(b)(2). However, Commission regulations allow publicly funded presidential candidates to accept private contributions and deposit them in separate accounts, called

² KE04 made these purchases through its media buyer, Riverfront Media SMLLC ("Riverfront"). The \$43,794,095 amount represents the total KE04 paid to Riverfront less refunds paid to KE04, as determined in the Commission's audit of KE04. See Report of the Audit Division on KE04 and KE-GELAC, 24 (June 14, 2007).

GELACs, to pay for various legal, accounting, and other compliance expenses. *See* 11 CFR 9003.3. Contributions to GELACs must be raised and spent in accordance with the requirements set forth in 11 CFR 9003.3. The purpose of GELACs is to permit publicly funded presidential campaigns to preserve their public funds for campaign expenses by allowing them to pay their legal compliance expenses with private contributions. *See* Public Financing of Presidential Primary and General Election Candidates: Final Rules, 60 Fed. Reg. 31854, 31855 (June 16, 1995). If a presidential campaign uses public funds to pay for compliance costs, then the GELAC may reimburse the campaign's public funds account for such payments. *See* 11 CFR 9003.3(a)(2)(ii)(G).

Commission regulations permit the use of GELAC funds for "legal and accounting services provided solely to ensure compliance with [FECA and the Fund Act]." 11 CFR 9003.3(a)(2)(i)(A). Commission regulations also permit the use of GELAC funds for other enumerated expenses set forth in the regulation. *See* 11 CFR 9003.3(a)(2)(i)(B) – (H). In addition, in Advisory Opinion 2004-35 (KE04), the Commission determined that recount expenses, although not specifically listed in 11 CFR 9003.3(a)(2), "generally fit within the permissible uses of GELAC funds specified in 11 CFR 9003.3(a)(2)."

The Bipartisan Campaign Reform Act of 2002³ contains a provision (known as the "stand-by-your-ad" provision) requiring candidates to devote at least four seconds of any authorized television advertisements to a written disclaimer, in addition to the general disclaimer requirements applicable to television broadcasts. *See* 2 U.S.C. 441d(a), (c), (d)(1)(B)(ii); 11 CFR 110.11(c)(3)(iii)(B).

All of the KE04 advertisements were required to devote a minimum of four seconds specifically to compliance with the Act's disclaimer requirements. Absent these disclaimer requirements, KE04 could have used that portion of the broadcast time purely for campaign purposes. Thus, if the Kerry-Edwards Campaign were required to use public funds to pay for the cost of broadcasting the four-second disclaimer, it would be able to purchase a measurably smaller amount of broadcasting time that could actually be devoted to campaign speech than it otherwise would have been able to purchase. By contrast, if the Kerry-Edwards Campaign used KE-GELAC funds to pay for the broadcasting time devoted to compliance with the Act's disclaimer requirements, the campaign's public funds would be available to pay for costs of campaign speech. This would advance the GELAC's purpose of preserving public funds for campaign expenses.

The Commission concludes that, like the recount expenses in Advisory Opinion 2004-35 (KE04), the portion of the broadcasting costs incurred by the Kerry-Edwards Campaign in complying with FECA's disclaimer requirements fit within the permissible uses of GELAC funds specified in 11 CFR 9003.3(a)(2).

³ Pub. L. No. 107-155, sec. 311(2), 116 Stat. 81, 105-06 (2002).

2. *If the answer to question 1 is yes, what percentage of the costs of airing the advertisements (\$43,794,095) may be treated as a compliance expense? Would 5% be appropriate, based on the reasoning behind the 5% "default" percentage in the Compliance Manual?*

The Kerry-Edwards Campaign may treat no more than 5% of the costs of airing advertisements as a compliance expense.

The Commission notes that permission to allocate some of these costs stems from the unique nature of the public Presidential financing system. Only those candidates who will receive the full grant in the General Election are permitted to have a compliance fund. 11 CFR 9003.3. No other Federal candidates are permitted to maintain a compliance fund under any circumstances. See 2 U.S.C. 441a(a)(1) and 441i(e). As such, this Advisory Opinion has no applicability to any candidate or political committee without a compliance fund.

As described in your request, some of the Kerry-Edwards Campaign's media costs were incurred to ensure compliance with FECA and the Fund Act. Each advertisement included a minimum of four seconds devoted to compliance with the disclaimer requirements set forth in 2 U.S.C. 441d and 11 CFR 110.11.

Commission regulations provide an allocation method for identifying compliance costs that GELACs may pay or reimburse. For example, GELAC funds may be used to pay for a portion of payroll and overhead expenditures of national campaign headquarters and State offices because "a portion" of these expenditures "are related to ensuring compliance" with FECA and the Fund Act. 11 CFR 9003.3(a)(2)(ii)(A). The regulation provides several allocation methods using fixed percentages.⁴ Included among these methods is an allowance of 5% of all payroll and overhead expenditures associated with the national campaign headquarters office (other than the legal and accounting costs centers). See *General Election Supplement to the Financial Control and Compliance Manual*, 20 (2000); see also 11 CFR 9003.3(a)(2)(ii)(F) (citing the *Financial Control and Compliance Manual*).

Recognizing that compliance expenses are part of the Kerry-Edwards Campaign's advertisement program, the Commission concludes that it is appropriate to use an analogous 5% figure in this instance. The Kerry-Edwards Campaign may therefore consider up to 5% of the costs of airing advertisements to be compliance expenses for its television advertising program. Thus, KE-GELAC may reimburse KE04 an aggregate amount up to 5% of the costs of airing those advertisements, provided that the costs of airing the advertisements are documented in accordance with 26 U.S.C. 9003(a), 11 CFR 9003.3(a)(3)(ii), and 9003.5.

⁴ See 11 CFR 9003.3(a)(2)(ii)(A) (permitting 10% of payroll and overhead expenditures of national campaign headquarters and State offices); 9003.3(a)(2)(ii)(D) (permitting 50% of costs associated with computer services); and 9003.3(a)(2)(ii)(C) and (E) (permitting larger allocations when documented).

KE-GELAC receipts are contributions and must comply with FECA's amount limitations and source prohibitions. *See* 11 CFR 9003.3(a)(1)(i)(B). Further, KE-GELAC must report all of its receipts and disbursements in a separate report in accordance with 11 CFR 9006.1(b)(2). *See* 11 CFR 9003.3(a)(3)(ii). These amount limitations, source prohibitions, and reporting requirements apply to KE-GELAC's contributions and disbursements related to any reimbursements to KE-04 for the compliance portions of its broadcasting time purchases. Additionally, KE-04 must report its receipt of any reimbursement from KE-GELAC. *See* 2 U.S.C. 434; 26 U.S.C. 9009(b); and 11 CFR 9006.1(b)(1).⁵

This response constitutes an advisory opinion concerning the application of FECA, the Fund Act, and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requester may not rely on that conclusion as support for its proposed activity. The advisory opinions cited herein may be found on the Commission's website at www.fec.gov.

Sincerely,



David M. Mason
Vice Chairman

⁵ This Advisory Opinion does not alter any of the Commission's determinations in the audit of KE04 and KE-GELAC. *See* Report of the Audit Division on KE04 and KE-GELAC (June 14, 2007).